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Nos. 10-238, 10-239

In The Supreme Court of the United States

ARIZONA FREE ENTERPRISE CLUB'S FREEDOM CLUB PAC, *et al.*,

Petitioners,

v.

KEN BENNETT, *et al.*,

Respondents.

JOHN MCCOMMISH, *et al.*,

Petitioners,

v.

KEN BENNETT, *et al.*,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF THE YANKEE INSTITUTE FOR PUBLIC POLICY AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED FOR REVIEW

1.

Whether *Citizens United v. Federal Election Comm'n*, 130 S. Ct. 876 (2010), and *Davis v. Federal Election Comm'n*, 128 S. Ct. 2759 (2008), require this Court to strike down Arizona's matching funds trigger under the First and Fourteenth Amendments because it penalizes and deters free speech by forcing privately-financed candidates and their supporters to finance the dissemination of hostile political speech whenever they raise or spend private money, or when independent expenditures are made, above a "spending limit."

2.

Whether *Citizens United* and *Davis* require this Court to strike down Arizona's matching funds trigger under the First and Fourteenth Amendments because it regulates campaign financing in order to equalize "influence" and financial resources among competing candidates and interest groups, rather than to advance directly a compelling state interest in the least restrictive manner.

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AMICUS CURIAE BRIEF OF THE YANKEE INSTITUTE FOR PUBLIC POLICY

The Yankee Institute for Public Policy ("Yankee Institute"), on behalf of itself and its members, submits this *amicus curiae* brief in support of the Petitioners. Pursuant to Supreme Court Rule 37.3(a), this *amicus curiae* brief is filed with the consent of all the parties.[1]

IDENTITY AND INTEREST OF *AMICUS CURIAE*

The Yankee Institute is a nonpartisan educational and research group organized in the 1980s under the laws of the State of Connecticut. The Yankee Institute's core mission is to promote economic opportunity in Connecticut.

The Yankee Institute has over 800 members – most of whom reside in and are taxpayers of the State of Connecticut. If the Ninth Circuit's decision is affirmed and Arizona's triggered matching funds provisions are upheld as constitutional, it is likely that such a decision will pave the way for the Connecticut

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[1] All parties have issued blanket consents to the filing of *amicus curiae* briefs in support of either party or neither party. The Yankee Institute affirms that no counsel for a party authored this brief in whole or in part and that no party, person or entity made a monetary contribution specifically for the preparation or submission of this brief.

legislature to reenact similar triggered matching funds provisions in Connecticut's campaign finance law, thereby increasing the scope of government involvement in elections and the amount of taxpayer dollars that are used to fund political campaigns and hostile political speech. The Yankee Institute and its members fundamentally oppose such a law and have an interest in the outcome of this case. Therefore, the Yankee Institute respectfully submits this *amicus curiae* brief in support of the Petitioners.

SUMMARY OF ARGUMENT

The Arizona triggered matching funds provisions at issue in this appeal impose an unconstitutional burden on the exercise of free speech rights protected by the First and Fourteenth Amendments of the Constitution and, therefore, should be struck down. By upholding Arizona's trigger provisions, the United States Court of Appeals for the Ninth Circuit defied this Court's holding in *Davis v. Federal Election Comm'n*, 128 S. Ct. 2759 (2008), and the holdings of other Circuits that have followed *Davis*, including the Second Circuit which recently held that Connecticut's supplemental matching funds provisions, like Arizona's, unconstitutionally chilled political speech by forcing privately financed candidates and their supporters to finance the dissemination of hostile political speech whenever they raise or spend private money above certain threshold limits. The 2010 gubernatorial primary elections in Connecticut

demonstrated how these provisions, in practice, chill and deter constitutionally protected speech and reduce political discourse by causing candidates to reduce the amount that they would otherwise raise or spend on their campaigns. The Connecticut triggered matching funds provisions are similar to the Arizona provisions at issue in this appeal. Therefore, and in accordance with *Davis*, this Court should strike down Arizona's triggered matching funds provisions as unconstitutionally burdening First Amendment political speech.

ARGUMENT

I. THIS COURT SHOULD STRIKE DOWN THE ARIZONA TRIGGERED MATCHING FUNDS PROVISIONS BECAUSE THEY VIOLATE THE FIRST AND FOURTEENTH AMENDMENTS OF THE CONSTITUTION BY UNCONSTITUTIONALLY CHILLING PROTECTED FREE SPEECH.

The United States Court of Appeals for the Ninth Circuit defied *Davis* when it upheld Arizona's triggered matching funds provisions as imposing only an insubstantial burden on the exercise of First Amendment rights. The Ninth Circuit's decision is inconsistent with other Circuits that have followed *Davis*, including the Second Circuit, which struck down Connecticut's triggered matching funds provisions as unconstitutionally infringing on candidates' protected campaign speech. More importantly, if

the Ninth Circuit's decision is allowed to stand, then constitutionally protected speech will be deterred in Arizona and elsewhere under a trigger matching funds regime.

A. The Connecticut's Triggered Matching Funds Provisions and Their Chilling Effect on the 2010 Primary Elections.

One needs not look any further than Connecticut to see the chilling impact these types of laws have on speech. Having gone through the 2008 and 2010 election cycles with a program similar to Arizona's – including triggered matching funds provisions – the constitutional rubber met reality's road in Connecticut.[7] What the 2010 primary elections in Connecticut

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[7] Although in force for the 2008 legislative elections, the first statewide races, including for Governor, under the CEP occurred in 2010. In 2010, $27.3 million was spent from the Citizens Election Fund on elections. Statewide, 445 candidates stood for election on the general election ballot and 296 of those candidates, or 67%, participated in the CEP. Of the 129 candidates that were in competitive races with spreads of less than 15%, only six non-participating candidates (5%) won their races. These statistics are available on the State Elections Enforcement Commission, List of Participating and Nonparticipating Candidates at http://www.ct.gov/seec and the Secretary of State's Statement of the Vote available at http://www.statementofvote-sots.ct.gov/StatementOfVote/WebModules/ReportsLink/OfficeTitle.aspx.

Other statistics of note from the 2010 elections include: 8 statewide candidates participated in the CEP during the primary elections; 7 statewide candidates participated in the CEP during the general election; 34 General Assembly primary

(Continued on following page)

demonstrated, and what is most troubling to the Yankee Institute, is that triggered matching funds provisions, while purporting to increase political discourse, actually chill political speech in elections by forcing privately-financed candidates and their supporters to finance the dissemination of hostile political speech whenever they raise or spend private money above certain threshold limits.

The chilling impact that Connecticut's supplemental matching funds provisions had on the speech of candidates for Governor in Connecticut's 2010 primary elections and their supporters is recalled below.

1. The Citizens' Election Program

In 2005, Connecticut enacted the "Citizens' Election Program" ("CEP") in order to reduce the need for candidates to fundraise; infuse "clean" money into the election process; eliminate the perception that big donors buy influence; level the playing field; and open

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candidates participated in the CEP; 249 participating candidates ran for the General Assembly in the general election (this represents 67% of the general election General Assembly candidates); 84 general election candidates chose not to participate in the CEP; 6 statewide candidates opted out of the CEP during the primary elections; 8 statewide candidates opted out for the general election; 84 candidates for the General Assembly opted out of the CEP during the general election. *See id.*

the process to a greater number of candidates.[3] *See Green Party of Conn. v. Garfield*, Nos. 09-3760-cv(L), 09-3941(CON), 2010 U.S. App. LEXIS 14286, at **4-6 (2nd Cir. Jul. 13, 2010); CONN. GEN. STAT. §§ 9-700 *et seq.* The CEP was inspired, in part, by the Arizona Citizens Clean Elections Act, A.R.S. §§ 16-940 *et seq.*, and provides public financing for candidates for legislative and executive state offices, including Governor. CONN. GEN. STAT. §§ 9-702 and 9-703.

To be entitled to public financing under the CEP, participating candidates must limit their fundraising and campaign spending to amounts specified in the CEP and are required to obtain a specified amount of "qualifying contributions" based on the office for which he or she is running.[4] *See id.* at §§ 9-702(b) and 9-704. For example, a candidate for Governor must receive an aggregate of $250,000 of which $225,000 or more must be contributed by individuals residing in the state. *Id.* at § 9-704(a)(1). Upon reaching this threshold, a participating candidate for Governor would then be eligible for a public grant of $1.25 million in a primary. *Id.* at § 9-705. A participating candidate for Governor who won a primary would then be eligible to receive an additional $3 million

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[3] *See* the State Elections Enforcement Commission webpage at: http://www.ct.gov/seec/cwp/view.asp?a=3556&q=432196.

[4] "Qualifying contributions" are monetary contributions of, at most, one hundred dollars from qualified electors. *Id.* at § 9-704

public grant for the general election campaign, under the law at the time of the 2010 primaries.[5]

Like the Arizona Citizens Clean Elections Act, A.R.S. §§ 16-940 *et seq.*, when the CEP was enacted it contained triggered matching funds provisions known as (1) the Excess Expenditure Trigger Provision, CONN. GEN. STAT. § 9-713; and (2) the Independent Expenditure Trigger Provision, CONN. GEN. STAT. § 9-714 (herein referred to, together and separately, as "the triggered matching funds provisions").[6] Candidates who participated in the program ("participating candidates") received additional public subsidies in response to funds received or spent by their opponents who did not participate in the program ("non-participating candidates"). *Id.* at § 9-713. The law also treated any independent expenditures made by a third party on behalf of a non-participating candidate as expenditures by the non-participating candidate for purposes of triggering additional funding for participating candidates who did not benefit from the third party independent expenditure.

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[5] The grant amount was subsequently increased from $3 million to $6 million after the legislature repealed the CEP's triggered matching funds provisions in an effort to circumvent the Second Circuit's decision in *Green Party*. *See* 2010 Conn. Acts 10-2 (Reg. Sess.).

[6] Funds spent under the CEP – including the triggered matching funds provisions – are public monies distributed from a state fund known as the Citizens Election Fund. CONN. GEN. STAT. § 9-701.

When a non-participating candidate received contributions or spent more than an amount equal to the participating candidate's initial grant amount, then the participating candidate would be eligible to receive up to four additional grants, each worth 25% of the initial grant amount. CONN. GEN. STAT. § 9-705. The triggered matching funds grants would be distributed whenever the non-participating candidate received contributions or made expenditures exceeding 100%, 125%, 150% and 175% of the initial grant amount. *Id.* In this way, a participating candidate could receive as much as $2.5 million in public funds for the primary elections, and as much as $6 million in public funds for the general election, if opposed by a non-participating candidate who spent more than 175% of the participating candidate's initial grant amount.

For example, assume that a primary election for a major party nomination for Governor in Connecticut pitted one participating candidate against one non-participating candidate. Once the participating candidate qualified under the CEP by raising $250,000 as described above, he would receive a $1.25 million grant to run his campaign. Assume that the non-participating candidate then spent or received $1,250,001 – one dollar over the $1.25 million grant amount, the participating candidate would then receive a supplemental grant of $312,500. The participating candidate would then receive an additional $312,500 once the non-participating candidate spent or received over $1,562,500. This would continue in

increments of $312,500 until the end of the election or the participating candidate received a total of $1.25 million in supplemental grants – a total grant to the participating candidate of $2.5 million. Although these provisions were eventually struck down,[7] they played a large role in the 2010 primary elections and chilled political speech and participation in ways that were inapposite to the stated purpose of the CEP.[8]

2. The *Green Party* Litigation

In 2006, well before the 2010 primary elections and the related litigation that ensued, several plaintiffs challenged the CEP on the grounds that the law was unconstitutional because, *inter alia*, the triggered matching funds provisions unconstitutionally burdened the plaintiffs' First Amendment rights. *Green Party*, 2010 U.S. App. LEXIS 14286, at **16-17. The District Court agreed with the plaintiffs and struck down the CEP's triggered matching funds provisions. *Green Party of Conn. v. Garfield*, 648 F. Supp. 2d 298 (D. Conn. 2009).

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[7] *See Green Party*, 2010 U.S. App. LEXIS 14286. A discussion of this case is below in Sections A.2 and B, *supra*.

[8] The State Elections Enforcement Commission's website states that "by eliminating their reliance on perpetual fundraising, it allows candidates to focus more on voters during the run-up to election day, listening to their needs and concerns, instead of 'dialing for dollars' to keep the their campaigns running, a tradition of many prior election campaigns." *See* http://www.ct.gov/seec/cwp/view.asp?a=3556&q=432196.

The state appealed, and on July 13, 2010 – just weeks before Connecticut's hotly-contested gubernatorial primary elections – the United States Court of Appeals for the Second Circuit affirmed the judgment declaring unconstitutional the triggered matching funds provisions and reversed other portions of the judgment not relevant to the appeal before this Court. The Second Circuit held that the triggered matching funds provisions "impose[d] a substantial burden on the exercise of the First Amendment right to use personal funds for campaign speech" and that "the state had not asserted a compelling state interest in burdening such speech." *Green Party*, 2010 U.S. App. LEXIS 14286, at *74. The Second Circuit agreed "with the District Court that the triggered matching funds provisions violate the First Amendment because they operate in a manner similar to the law that the Supreme Court struck down in *Davis v. Federal Election Commission*, 128 S. Ct. 2759, 171 L. Ed. 2d 737 (2008)." *Id.* at *77.

These were precisely the burdens faced by non-participating candidates in the 2010 Connecticut primary elections for Governor.

3. The 2010 Primary Elections

In late 2009, Connecticut's sitting governor, M. Jodi Rell, announced her intention that she would not seek re-election. After the nominating conventions

in May 2010, five candidates among the two major parties qualified for their respective primaries.[9] Each would be affected by the CEP and its triggered matching funds in different ways.[10] The candidates were: Dannel Malloy, a Democrat, who participated in the CEP; Ned Lamont, a Democrat, who largely self-financed his campaign and did not participate in the CEP; Lieutenant Governor Mike Fedele, a Republican, who participated in the CEP; Tom Foley, a Republican, who did not participate in the CEP; R. Nelson "Oz" Griebel, a Republican, who also did not participate in the CEP. The three Republican candidates took very different paths to financing.[11]

On July 8, 2010, after qualifying for and obtaining an initial grant of $1.25 million under the CEP,

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[9] There were several other candidates for nomination for Governor from both the Republican and Democratic parties who failed to qualify for the primary ballot. Of those candidates, several participated in the CEP but were unable to reach the minimum qualifying amounts.

[10] Although at least two state legislative races implicated the triggered matching funds provisions, for purposes of this brief the Yankee Institute will focus primarily on the two gubernatorial races that implicated these provisions.

[11] The Connecticut Republican Party held its convention for the purpose of endorsing candidates for numerous statewide offices, including Governor, on May 21-22, 2010. At the Convention, the Republican Party endorsed Mr. Foley as its candidate for Governor. Lieutenant Governor Fedele and Mr. Griebel also each garnered enough support at the Convention to qualify for the Republican primary for Governor. *See* CONN. GEN. STAT. §§ 9-372 *et seq.*

Lieutenant Governor Fedele applied for $937,500 in supplemental matching funds (an amount equal to 175% of the initial grant amount) pursuant to the triggered matching funds provisions. *Foley v. State Elections Enforcement Commission*, No. 3:10cv1091, 2010 U.S. Dist. LEXIS 71744, at *7 (D. Conn. Jul. 16, 2010). This was based on Mr. Foley's purported expenditures above $1.25 million. This application – along with his application for the initial grant – led to extensive litigation involving the propriety of the grants by the State Elections Enforcement Commission ("SEEC") and their interpretation of the CEP statutory scheme.[12]

On July 14, 2010 – shortly after the Second Circuit's ruling in the *Green Party* litigation and some four weeks before the primary elections scheduled for August 10, 2010 – Lieutenant Governor Fedele applied for the remaining supplemental matching funds in the amount of $312,500. This was triggered by Mr. Foley expending more than 175% of the initial grant amount.[13] *Id.* In response, Mr. Foley filed an

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[12] *See Foley v. State Elections Enforcement Commission*, No. 3:10cv1091, 2010 U.S. Dist. LEXIS 71744, at *7 (D. Conn. Jul. 16, 2010); *Foley v. State Elections Enforcement Comm'n*, 297 Conn. 764 (2010).

[13] Although the SEEC had determined that the Foley campaign exceeded the threshold limits of the triggered matching funds provisions entitling his participating opponent to supplemental funds, this issue was decided by the courts in the litigation surrounding the primary election grants under the CEP. When making decisions about expenditures, the Foley campaign had a different reading of the triggered matching funds provisions

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application for a temporary restraining order and permanent injunction seeking to prevent the SEEC from issuing the remaining matching funds because the United States Court of Appeals for the Second Circuit had found the triggered matching funds provisions unconstitutional just days earlier.[14] *Id.* at **7-8. The District Court denied the temporary restraining order notwithstanding that it found Mr. Foley would be irreparably harmed by the triggered matching funds provisions because "the vigorous exercise of the right to use personal funds to finance campaign speech produces fundraising advantages for opponents in the competitive context of electoral politics." *Id.* at **14-15 (citing *Davis*, 128 S. Ct. at 2772).

Although the triggered matching funds provisions had previously been declared unconstitutional, Lieutenant Governor Fedele's final supplemental grant in the amount of $312,500 was nonetheless approved by the SEEC on July 21, 2010 and he received the

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than the SEEC and therefore did not think it had exceeded those thresholds contrary to the SEEC's interpretation of the law. *See Foley v. State Elections Enforcement Commission*, 297 Conn. at 784 (2010). This good faith dispute was not settled until July 20, 2010, less than 25 days before the primary elections. *See id.* at 764.

[14] The District Court lacked jurisdiction to simply enjoin the SEEC from approving matching funds in accordance with the Second Circuit's decision in *Green Party* because the Second Circuit had yet to issue a mandate. *Id.* at **8-9.

money.[15] Ultimately, the non-participating Mr. Foley edged the participating Lieutenant Governor Fedele and the non-participating Mr. Griebel in a close primary.

At the same time, the Democratic primary featured one participating candidate – Mr. Malloy – and one non-participating candidate – Mr. Lamont. Mr. Malloy qualified for the initial public grant of $1.25 million and later received triggered matching funds totaling $1.25 million in response to spending in excess of the cap by Mr. Lamont.[16] Mr. Malloy, the participating candidate having received $2.5 million in public funds, won the primary.

4. The Harm

The outcomes of both primaries were significantly influenced – and perhaps determined – by the triggered matching funds provisions.

Leading up to the award of the CEP grants, Mr. Foley was mindful that any money he spent over $1.25 million in the primary would trigger public

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[15] *See* minutes of the SEEC' regular meeting on July 21, 2010 which are available at http://www.ct.gov/seec/lib/seec/2010commissionmeetings/minutes_07212010.pdf.

[16] *See* minutes of the SEEC' regular meetings on June 3, 2010 and June 23, 2010 which are available at http://www.ct.gov/seec/lib/seec/2010commissionmeetings/minutes_06032010.pdf; http://www.ct.gov/seec/lib/seec/2010commissionmeetings/minutes_06232010.pdf.

funds supporting hostile speech for his participating opponent. Accordingly, he made different decisions than he would have otherwise made in terms of whether, when and how much he would spend. This placed a substantial burden on his First Amendment right to freedom of speech. Specifically, each and every expenditure related to direct and indirect voter contacts – protected political speech – were reduced as a result of the triggered matching funds provisions. Clark Aff. ¶ 6. This reduction in expenditures resulted in less voter contact and, thus, less constitutionally protected political speech.[17]

Additionally, as a result of these provisions, careful attention was given to the timing of expenditures. Clark Aff. ¶ 8. The Foley campaign was forced to make expenditures on television advertising before the primary period began in order to avoid those expenditures being counted toward any trigger.[18]

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[17] Further, 2010 saw a national political environment with many competitive races. This led to increased competition for political talent and, thus, increased salary costs. Clark Aff. ¶ 7. As a result of the triggered matching funds provisions, the Foley campaign was forced to spend less on employee salaries and was thus less competitive in recruiting talent to work on the race and thus engage in political speech.

[18] It is important to note that the timing of expenditures was a large part of the litigation surrounding the CEP. One of the central issues raised was "whether a candidate participating in the [CEP] was entitled to supplemental grants for a primary campaign pursuant to § 9-713(a), [based upon] contributions received by or expenditures made by the opposing nonparticipating candidate before the primary period has started may be considered." *Foley*, 297 Conn. at 764 (2010).

Clark Aff. ¶ 8. The campaign's message was therefore diluted as it was delivered further from the primary than it otherwise would have been without the triggered matching funds provisions. Clark Aff. ¶ 9. This resulted in a more difficult – and closer – primary than might otherwise have been necessary had Mr. Foley not been deterred from making expenditures – exercising political speech – at the time he viewed as optimal. Clark Aff. ¶ 9. Not only did the triggered matching funds provisions alter the course of the Republican primary, they also affected the general election because the extra public funds were used for a barrage of negative advertizing, the impact of which carried over long after the primary. Clark Aff. ¶ 10.

The non-participating, self-financed Democrat, Mr. Lamont, faced a similar dilemma in his primary campaign. Ultimately Mr. Lamont's spending triggered $1.25 million of triggered matching funds which in turn were used to fund hostile speech by his opponent, Mr. Malloy. The participating, publicly-funded Mr. Malloy would ultimately defeat the non-participating, self-financed Mr. Lamont in the Democratic primary.

Similar harms befell the other non-participating candidate in the Republican primary, Mr. Griebel. This was particularly so because Mr. Griebel did not raise or spend more than the CEP threshold amounts, unlike Mr. Foley. Moreover, when Mr. Foley exceeded the CEP threshold limits, it triggered public funds to go to Lieutenant Governor Fedele leaving Mr. Griebel further behind both candidates in terms of financial

resources. Mr. Griebel was not able to significantly supplement his campaign with personal money. Griebel Aff. ¶ 6. Additionally, Mr. Griebel's campaign was hamstrung by campaign contribution limits imposed by the CEP. Griebel Aff. ¶ 7. These restrictions prevented candidates from raising money from state contractors and lobbyists.[9] CONN. GEN. STAT. §§ 9-610 and 9-612. As a non-participating candidate, Mr. Griebel did not and could not have raised the money necessary to compete because of these restrictions and, more importantly, because of the supplemental matching funds provisions. Griebel Aff. ¶ 9.

In this way, the CEP has created a coercive system whereby only participating candidates and those willing to self-fund or raise substantial sums of private dollars can run for public office with any reasonable likelihood of winning. Any other candidate would face the "double-whammy" of restrictive contribution limits and increased public funding in the campaign which drives non-participating, non-wealthy and non-financed candidates from the race and further deters speech.

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[9] These restrictions were, in large part, struck down by the United States Court of Appeals for the Second Circuit. *See Green Party*, 2010 U.S. App. LEXIS 14286, at *74

B. Arizona's and Connecticut's Triggered Matching Funds Provisions Are Unconstitutional Under *Davis*.

In striking down Connecticut's triggered matching funds provisions, the Second Circuit compared those provisions to the "Millionaire Amendment" that this Court struck down in *Davis*. The Second Circuit concluded that the triggered matching funds provisions, like *Davis*' "Millionaire Amendment," caused a non-participating candidate to "shoulder a special and significant burden" if the candidate chose to exercise her First Amendment speech rights because the more money the non-participating candidate spent above the initial grant amount, the more money her participating opponent would receive. *Green Party*, 2010 U.S. App. LEXIS 14286, at **80-81. In fact, the Second Circuit held that the "penalty" imposed by the triggered matching funds provisions is "harsher" and, therefore, more constitutionally objectionable than *Davis*' "Millionaire Amendment." *Id.* at **82-83.

Beyond the theoretical analysis espoused in *Green Party*, triggered matching funds provisions like Arizona's have proven unconstitutional in practice as well as in theory. The 2010 gubernatorial primary elections in Connecticut demonstrated how these provisions deter constitutionally protected speech and reduce political discourse by causing non-participating candidates to reduce the amount that they would otherwise raise or spend on campaigns because raising or spending above certain threshold limits would result in their participating opponents receiving

additional financing to fund the dissemination of hostile political speech. These provisions run directly afoul of *Davis* and are the same type of provisions before the Court in the titled appeal. Accordingly, and in harmony with *Davis*, the Court should find that Arizona's triggered matching funds provisions, like Connecticut's, impose an unconstitutional penalty on First Amendment political speech.[20]

CONCLUSION

The Yankee Institute, as *amicus curiae*, respectfully urges this Court to strike down Arizona's triggered matching funds provisions.

Respectfully submitted by Counsel for
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[20] The Second Circuit found the Ninth Circuit's decision in *McComish v. Bennett*, 605 F.3d 720 (9th Cir. 2010), unpersuasive. *Green Party*, 2010 U.S. App. LEXIS 14286, at *83 fn. 19.

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I, Justin Clark, do on oath depose and state as follows:

1. I am over eighteen (18) years of age and I believe in the duty and obligations of an oath.

2. I reside in West Hartford, Connecticut and am registered to vote in the State of Connecticut.

3. I was the campaign manager for Foley for Governor, the gubernatorial campaign for Thomas C. Foley. Mr. Foley won the Republican Party primary election for governor in 2010 and became the nominee for that party on August 10, 2010. As campaign manager I took part in all strategic and tactical decisions during the campaign, including all decisions related to spending and strategy regarding campaign finance.

4. Mr. Foley did not participate in Connecticut's public financing system known as the Citizens' Election Program ("CEP").

5. As a non-participating candidate, and with a participating opponent in the Republican Party primary election, the campaign was keenly aware of the triggered matching funds provisions of the CEP, particularly the Excess Expenditure Trigger Provision, Conn. Gen. Stat. § 9-713 ("the triggered matching funds provisions").

6. As a result of the triggered matching funds provisions, each and every expense related to direct and indirect voter contacts during the primary election campaign were reduced during different time periods of the campaign.

7. One particular campaign expense was higher than normal in 2010. As a result of the national environment, there was an increased competition for political talent and thus, increased salary costs.

8. Additionally, as a result of these provisions, careful attention was given to the timing of expenditures. Due to the trigger dates in the statute, the campaign was forced to make expenditures on television advertising before the primary period began, and thus avoid those expenditures being counted toward any trigger.

9. The campaign's message was therefore diluted as it was delivered further from the primary election than it otherwise would have been without the triggered matching funds provisions. This resulted in a more difficult primary than might otherwise have been necessary had Mr. Foley and the campaign not been deterred from participating in political speech at the time he and it viewed as optimal.

10. The triggered matching funds provisions altered the course of the primary election, and changed the outcome of the general election because the extra public funds were used for a barrage of largely negative advertizing, the impact of which carried over long after the primary..

The foregoing is true, accurate and correct to the best of my knowledge, information and belief, under the penalty of perjury.

Dated at West Hartford, Connecticut, this 16th day of January, 2011.

/s/ Justin Clark

Subscribed and sworn to before
me this 16th day of January, 2011.

/s/ Peter J. Martin
Commissioner of the Superior Court

NOS. 10-238, 10-239

IN THE SUPREME COURT
OF THE UNITED STATES

ARIZONA FREE ENTERPRISE CLUB'S
FREEDOM CLUB PAC, et al.,
Petitioners,

v.

KEN BENNETT, et al.,
Respondents.

JOHN MCCOMMISH, et al.
Petitioners,

v.

KEN BENNETT, et al.,
Respondents.

AFFIDAVIT OF R. NELSON "OZ" GRIEBEL

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Counsel for Amicus Curiae, the Yankee Institute for Public Policy

I, R. Nelson "Oz" Griebel, do on oath depose and state as follows:

1. I am over eighteen (18) years of age, and I believe in the duty and obligations of an oath.

2. I reside in Weatogue, Connecticut and am registered to vote in the State of Connecticut.

3. I participated in the Republican Party primary election for governor in 2010.

4. I did not participate in Connecticut's public financing system known as the Citizens' Election Program ("CEP").

5. As a non-participating candidate with a Republican primary opponent who was participating in the CEP, I was keenly aware of the triggered matching funds provisions of the CEP, particularly the Excess Expenditure Trigger Provision, Conn. Gen. Stat. § 9-713 ("the triggered matching funds provisions").

6. I was not able to significantly supplement my campaign with personal money.

7. Additionally, my campaign was hamstrung by campaign contribution limits imposed by the CEP along with harsh consequences for noncompliance.

8. These restrictions and the noncompliance penalties prevented me from raising money from certain types of state contractors and lobbyists, many of whom said that they were prepared to provide financial support but for the prohibition and penalties.

9. As a nonparticipant in the CEP and due to the aforementioned restrictions, I could not and did not raise the money necessary to compete effectively, thereby infringing my rights of political speech as well as those of individuals prohibited from contributing.

The foregoing is true, accurate and correct to the best of my knowledge, information, and belief, under the penalty of perjury.

Dated at Hartford, Connecticut, this 14th day of January, 2011.

/s/ R. Nelson "Oz" Griebel

Subscribed and sworn to before
me this 14th day of January, 2011.

/s/ Nancy L. Marzano
1/14/11

NANCY L. MARZANO
NOTARY PUBLIC
MY COMMISSION EXPIRES NOV. 30, 2013